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No. 97-515 JUL 22 1997

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In The

Supreme Court of the United States

October Term, 1996

CHRISTOPHER A. TSIPOURAS,

Petitioner,

v.

MESHBESHER, BIRRELL & DUNLAP, LTD., ANDREW S. BIRRELL, JOHN LEUNIG, STEVEN MESHBESHER AND JOHN DOE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

First Question

Whether a civil legal malpractice action brought in federal court under diversity of citizenship seeking damages for not raising issues in a direct appeal of a state criminal conviction should be stayed pending exhaustion of state and federal habeas corpus proceedings.

Second Question

Whether the abstention doctrine applies to a civil legal malpractice action brought in federal court under diversity of citizenship seeking damages for not raising issues in a direct appeal of a state criminal conviction as long as state or federal habeas corpus proceedings are pending.

Third Question

Whether a judgment in a civil malpractice action seeking damages for not raising issues in the direct appeal of a criminal conviction tests the validity of the conviction.

Fourth Question

Whether a court erred in holding that a white defendant could not establish a violation of the equal protection rights of a black juror where the prosecution exercised a peremptory because the juror was black using Batson's "same race" standing requirement as a means to demonstrate that racial prejudice against the juror was impossible.

Fifth Question

Whether a criminal defendant who decides to testify at the end of the trial is prejudiced when a juror has a bias in

wanting to hear what the defendant has to say at the start of the trial where the court did not allow defense counsel to probe that bias during voir dire or attempt to reduce to a minimum any juror speculation in wondering what the defendant was going to say while the state was presenting its case.

Sixth Question

Whether criminal defense counsel is ineffective under the Strickland standard and whether the trial court erred in not removing jurors under the doctrines of actual and implied bias.

Seventh Question

Whether a defendant is denied a fair trial in a date rape case where a juror testifies that she was shocked when she heard about the case in the news and that she has strong feelings about date rape that she was not sure how that would affect her judgment.

Eighth Question

Whether a civil legal malpractice case against former appellate attorneys for not raising the issue of ineffective assistance of trial counsel in a direct appeal or in a post conviction forum may be dismissed on the pleadings with no discovery where there are factual allegations of improper investigation and failure to strike biased jurors.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Tsipouras respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit decided March 19, 1997.

OPINIONS BELOW

The opinion of the Eighth Circuit is not reported, but is reprinted in the Appendix at page 50. (A-50).

The opinion of the United States District Court for the District of Minnesota, Fourth Division, is not reported, but is reprinted in the Appendix at pages 1 through 36. (A-1 to A-36).

The judgment of the United States District Court entered on August 5, 1996 is reprinted in the Appendix at page 37. (A-37).

JURISDICTION

The judgment of the Eighth Circuit for which review is sought is dated March 19, 1997. The order of the Eighth Circuit denying petitioner's rehearing is dated April 23, 1997. This petition is filed within 90 after that last date and is timely under Rules 13 and 14 of the Rules of the Supreme Court.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

This case involves 28 U.S.C. § § 1331 and 1332 which are reprinted in the Appendix at page 58, Rule 12(b)(6) of the

Federal Rules of Civil Procedure which is reprinted in the Appendix at page 58, Minn.Stat. 590.01 which is reprinted in the Appendix at page 59, and 28 U.S.C. § 2254(b) which is reprinted in the Appendix at page 61.

STATEMENT OF THE CASE

Petitioner, plaintiff below, began this case with a complaint and jury demand dated December 12, 1995, which contained one count of legal malpractice, breach of contract and negligence that Mr. Grochal failed to properly and reasonably represent petitioner in a criminal trial that was held in December of 1989; and five counts of legal malpractice, breach of contract and negligence that Meshbesher, Birrell & Dunlap, Ltd., Messrs. Birrell, Leunig, and Meshbesher (respondents, hereinafter MBD) failed to properly and reasonably represent petitioner in the direct appeal of that criminal trial. Federal jurisdiction arises under diversity of citizenship and federal questions exist in plaintiff's cause of action. 28 U.S.C. §§ 1331 and 1332.

On February 12, 1996, MBD filed a motion to dismiss under Rule 12(b)(6) arguing that even if these issues were raised in the direct appeal a reversal would not have resulted, and that a legal malpractice claim does not accrue until the conviction is set aside. Subsequently, on February 14, 1996, Mr. Grochal's counsel also filed a motion to dismiss arguing public defender immunity. Mr. Grochal was dismissed out of the case without prejudice because he was a public defender.

Petitioner's claims against MBD may be summarized as follows:

1. That MBD did not raise a Batson claim in the direct appeal in that the trial court improperly concluded that a white defendant is not entitled to a Batson claim when a black juror is stricken;
2. That MBD did not raise an actual jury bias issue in the direct appeal;
3. That MBD failed to raise issues that trial counsel provided ineffective assistance of counsel by failing to do proper investigation and trial, and failing to remove biased jurors (both codefendants were acquitted).

In response to MBD's 12(b)(6) motion arguing the issues were meritless, petitioner argued that these issues had merit and should have been raised in the direct appeal, that petitioner is entitled to other damages because he has had to engage another attorney to pursue these issues in Minnesota postconviction proceedings, that MBD did not follow petitioner's letter asking that these issues be addressed (A-57), that petitioner was entitled to his retainer back, and that the case should have been stayed pending the exhaustion of the postconviction proceedings.

On August 2, 1996, the Honorable James M. Rosenbaum heard oral arguments on MBD's motion to dismiss pursuant to Rule (12)(b)(6). On August 5, 1996, an Order was entered dismissing petitioner's complaint for failure to state a claim upon which relief could be granted. (A-1 to A-37). On August 26, 1996, petitioner filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit. Briefs were filed with oral arguments heard on March 11, 1997. On March 19, 1997, the Eighth Circuit held that "the district court did not err by dismissing this case. The dismissal is affirmed". (A-50). On April 1, 1997, petitioner filed a motion for rehearing rearguing that a stay should have been granted. On April 23, 1997, the petition for rehearing was denied. (A-51).

The relevant facts are as follows. On August 9, 1989, Christopher A. Tsipouras, petitioner, worked for the music artist LL Cool J as a bodyguard. Petitioner was between semesters on college recess. That evening the band was performing at the Met Center in Bloomington. During the concert, petitioner met two girls and invited them both back to the hotel where the band and its employees were staying. Petitioner and the two girls took a limousine ride to the hotel. In the lobby of the hotel, petitioner indicated that he was going to go to his room to take a shower. He went to his room and the girls followed him moments later.

After a relatively substantial time had passed, petitioner had sex with a Ms. Holly Shadden in the bathroom of the hotel room. There was no struggling or no indications that Ms. Shadden did not want to have sex. She testified that she told petitioner to use a condom which petitioner stopped kissing her, walked out of the bathroom to get a condom, was gone several minutes, came back in the bathroom, put it on, and had sex with Ms. Shadden. Ms. Shadden never left the bathroom, did not use the phone that was in the bathroom, and did not yell scream or struggle in any manner. She also indicated that even after the alleged rape she still wanted pictures of LL Cool J and had friendly discussions with the other parties in the room including her friend Melissa. Apparently after petitioner had sex with Ms. Shadden and had left the hotel room, codefendants Gary Saunders and David Parker had sexual contact with Ms. Shadden and it was not until these subsequent sexual incidents that Ms. Shadden, by her own testimony, ever struggled or expressed that she did not want to have sex.

At approximately the same time, Ms. Shadden's friend, Melissa, had consensual sex with Mr. Andre Greaves who was also present in the hotel room. Afterwards, Ms. Shadden and Melissa left the hotel. Ms. Shadden indicated to the police that she had been raped. She identified petitioner, Mr. Parker and Mr. Saunders as the "rapists". All three were charged with first degree rape. Petitioner was tried in December of 1989 with public defender counsel and wrongly convicted of the charge. The two codefendants were tried together in the end of January 1990. Each hired private attorneys and were both acquitted. The jury did not believe that these defendants had raped Ms. Shadden as they viewed her credibility.

After petitioner's conviction, he retained a private firm for his appeal and post conviction matters. The record of the trial indicated the following exchange during voir dire with Juror Longson:

Mr.Grochal: In your mind my client is innocent right now.
Ms. Longson: Yes.
Mr. Grochal: Do you have a problem in holding the state to its burden of proving convincingly that my client is guilty?
Ms. Longson: No
Mr. Grochal: Do you think it's the way it should be?
Ms. Longson: I don't know of any alternative. I mean it's fine.
Mr. Grochal: Well, the alternative would be for my client to try and prove to you that he is innocent ?
Ms. Longson: It's fine the way it is.
Mr. Grochal: Would you expect my client to testify?
Ms. Longson: **It would be nice to hear what the young man had to say.**
Mr. Grochal: What if he didn't; makes it tough?
Ms. Longson: It makes it tougher, yes. I would like to hear both views.
The Court: Ma'am, let me interject because we are getting into an area of law. I didn't give an instruction on the defendant is required to testify. They have an absolute right to remain silent and do not have to testify if they do not wish to. If he chooses not to testify, you will receive a jury instruction that says that he doesn't have to testify and that you would not draw any negative or bad inference towards him as a result of that . Would you be able to follow this instruction if that fact scenario happens? He may testify and he may not. That's his decision.
Ms. Longson: That's fine, yes.
The Court: I wanted to clarify it since it was not an area of law that I got into when I gave the preliminary instruction but it's come up.
Mr.Grochal: **Would you be able to follow the instruction ?**
Ms. Longson: **No problem. He has the right to remain silent.** . . .

Mr. Grochal: You can make your decision based on evidence you hear and not as to what someone might have said?
Ms. Longson: Yes.
Mr. Grochal: There's been some concern raised about police officer's testimony and I don't anticipate that the case is going to turn on what the police officers have to say. This case like probably 95 percent of all criminal cases didn't occur in the presence of the police officers. They're not there when anything happened. They respond after they get a call.
Ms. Longson: Uh-huh.
Mr. Grochal: Is that going to bother you one way or the other; do you think they should have been there or are you going to think anything they say is gospel or are you not going to believe anything they say because of an experience you might have had?
Ms. Longson: Anything the police officers?
Mr. Grochal: The police officers.
Ms. Longson: **I would like to hear what -- the girl and the young man have to say.** I don't know what the policemen will say to really make it concrete. I mean, they were not there. You know. I probably am not making any sense.
Mr. Grochal: No, you are making sense. Keep coming back to this thing. Keep ringing bells in my head. I asked one of the jurors about this saying there are "two sides to every story" I'm sure you've heard the expression?
Ms. Longson: Yes.
Mr. Grochal: And essentially what it means is when you hear the state's version as they are required by law to present their version, the defense is not required -- the Judge will tell you that and already has --to present any evidence at all. But keep saying, "I would like to hear what the young man and the girl"--
Mr. Johnson: (Prosecutor) I object to any further inquiry on this line. I believe the question has been asked and

answered and the perspective juror has said she will follow the instruction as given by the Court.
The Court: The objection is sustained.

Ms. Longson demonstrated that she could not understand that "right to remain silent" instruction and the Court did not strike her for cause or allow the defense to further probe Ms. Longson's bias.

Subsequently, during jury selection, defense counsel voir dired Mr. Taylor. Defense counsel's questioning revealed that Mr. Taylor was a fair and impartial man to both the defense and the prosecution. After defense counsel elected to seat Mr. Taylor, the prosecutor exercised a peremptory challenge against Mr. Taylor. There is no reason nor can any reason even be contrived as the transcript is viewed as to why the prosecutor struck Mr. Taylor other than the fact that Mr. Taylor is a black man. Defense counsel made an objection citing Batson v. Kentucky. The following exchange took place:

Mr. Grochal: . . . I think I have no alternative but to make a motion at this time based on Batson v.Kentucky and the fact that I think the prosecution striking the one black juror denies my client the right to have a cross section of the community sit in this as jurors in this case. I guess I ask perhaps the Court to make an inquiry as to the reasons that the juror was stricken.
The Court: Before I get into an inquiry, do you have any response that you wish to make ? I'm not saying I will not inquire. Do you wish to respond to his request for an inquiry ?
Mr. Johnson: As Mr. Grochal noted, Your Honor, during jury selection process this morning in inquiring with the one juror, his client is not black. His client is white and there is no doubt in any of the jurors mind that he is white. And I don't think racial prejudice or racial discrimination in picking a jury is any issue in this case

given the fact that we don't have a black defendant.

The court denied the motion for mistrial stating:

> [T]hat, as you stated, Mr. Grochal, in your voir dire, that race is not an issue in this case in terms of cross race. It doesn't mean that a white defendant is entitled to an all white jury or a black defendant is entitled to an all black jury but there's been no threshold showing in this case and I will not do the inquiry. I don't see it as an issue here. You certainly protected your record. That's fine. (Tr. I 279).

During voir dire, jurors gave the following testimony:

1. Ms. Herzog-Lowery testified that she was robbed at gunpoint one week prior to being called (Tr. I-51);
2. Ms. Jaggers testified that her mother's house had been broken into and that Ms. Jaggers herself had money stolen. (Tr. 60, lines 15-18);
3. Ms. Longson also stated that her close niece that she viewed as her daughter was abducted, naively went voluntarily with a man not knowing of the possible consequences, that "something bad had happened", and that she was the victim herself of a theft (Tr. I 245-249). Also, Ms. Longson brought the abduction of her niece up on her own volition and interjected the court proceedings (Tr. I 128, lines 23-25, Tr. I 129 lines 1-18);
4. Mr. Welch indicated that his daughter had been molested (Tr. I lines 13-15);
5. Ms. Salek testified that she was shocked over the bizarre nature of the story when she read it in the paper. (Tr. I 76, lines 24-25) Further, when she was asked if she could put this aside she said she would "attempt to do so" three or four times. (Tr. I 77 lines 6-10). Ms. Salek also indicated that she has very strong feelings about date rape, that the perpetrator bears the main responsibility in date rape situations, and that she didn't know how her

strong feelings on date rape would affect her judgment. (Tr. I-284 lines 10-22). Ms. Salek also testified that she dwells on things that are negative, that she was concerned she would become obsessed with this trial and that she "can't change gears". (Tr. I 281 6-10).

6. Ms. Van who served as a juror alternate testified that her sister was raped. (Tr. I 96, lines 4-7) Neither, the defense counsel, the prosecutor nor the court questioned on this extremely relevant issue.

7.Wilcox testified that she had worked with a female student who had been the victim of a sexual assault as well as having worked with prosecutor's brother. (Tr. I 308)

The trial ensued. Petitioner was wrongly convicted of the charge. During the direct appeal, MBD (Appellate Attorneys) did not raise the jury bias issues or the Batson issue. MBD also neglected to raise an ineffective assistance of trial counsel claim or move for postconviction relief in light of the fact that both codefendants were acquitted. Even petitioner's trial judge stated that based on the victim's testimony, petitioner was "less brutal" than the codefendants.

Five years later, petitioner, retained his present counsel. On December 12, 1995, petitioner filed this civil suit in federal court against MBD seeking damages for breach of contract, legal malpractice and negligence. On March 5, 1996, petitioner filed for postconviction relief in Minnesota. On August 2, 1996 this civil suit was dismissed by order holding that the Batson issue and the jury bias issues were meritless. (A-27 to 37). On August 26, 1996, petitioner appealed to the Eighth Circuit.

On October 31, 1996, the original criminal trial Judge, the Honorable Philip D. Bush, denied the postconviction petition without a hearing. On the Batson claim, Judge Bush reiterated that at that time petitioner could not make a prima facie showing of discrimination against that juror because petitioner

was Caucasian and the juror was African American. (A-43). On December 16, 1996, petitioner appealed to the Minnesota Court of Appeals regarding the denial of postconviction relief.

On March 19, 1997 the Eighth Circuit affirmed judgement of dismissal which became final on April 23, 1997, rehearing was denied. This petition to the United States Supreme Court follows. On July 29, 1997, the Minnesota Court of Appeals affirmed the postconviction court's denial of relief. On August 22, 1997, petitioner filed a petition for certiorari to the Minnesota Supreme Court which is still pending as of September 17, 1997.

Petitioner contends that the Eighth Circuit erred in affirming the judgment of dismissal regarding this legal malpractice case. The matter should be remanded back to the district court and stayed pending completion of all related postconviction proceedings.

REASONS FOR GRANTING THE WRIT

The district court ruled on the pleadings that even if the Batson, jury bias and ineffective assistance of trial counsel claims were raised in the direct appeal, there would have been no reversal. (A-30 to A-37).The Eighth Circuit affirmed the judgement of dismissal without detailed explanation.(A-50)

I. THE EIGHTH CIRCUIT ERRED IN NOT REMANDING THE CASE TO THE DISTRICT COURT STAYING THE DAMAGES CLAIMS PENDING COMPLETION OF POSTCONVICTION PROCEEDINGS.

This action against MBD should have been stayed pending the outcome of petitioner's related postconviction proceedings. Federal courts should not dismiss claims for monetary damages that cannot be addressed in the related state proceedings. Rather, such claims for monetary damages

pending in federal court should be stayed pending the outcome of the related state proceedings. Deakins v. Monaghan, 108 S.Ct. 523, 529 (1988), 484 U.S. 193, 202. In Deakins, state officers took documents from the owners of a business pursuant to a state search warrant whereby grand jury proceedings were commenced. The business owners filed a 42 U.S.C. § 1983 civil rights action with pendent state law tort claims seeking damages against the state officials for an alleged illegal search and seizure, trespass, conversion, unlawful confinement and infliction of emotional distress. The Supreme Court held that the entire damages action pending in federal court consisting of the § 1983 claims and the pendent state law tort claims should be stayed rather than dismissed regardless of whether or not the abstention doctrine applies. Deakins v. Monaghan, 108 S.Ct. at 530, 484 U.S. at 202. This allows "[P]arallel state proceedings to go forward without interference from its federal sibling while enforcing proper jurisdictional obligations on the federal courts". Deakins v. Monaghan, 108 S.Ct. at 530, 484 U.S. at 202. This prevents the possibility of damages claims being foreclosed under the statute of limitations as well. Deakins v. Monaghan, 108 S.Ct. at 530, 484 U.S. at 202.

If the claims in federal court are disposed of on the merits, the decisions could have res judicata or stare decisis effect on the states without giving the states an initial opportunity to rule on whether a federal constitutional violation occurred. Deakins v. Monaghan, 108 S.Ct. at 523, 484 U.S. 208, (Justice White concurring). This could effect the states' interests to conduct their own legitimate activities. Younger v. Harris, 401 U.S. 37, 44, 91 S.Ct. 746, 750. See Also, Samuels v. Mackell, 401 U.S. 66, 91 S.Ct. 764 (1970). It has been consistently held that the states should be given an initial opportunity to rule upon and correct alleged violations of their prisoners' constitutional rights. Picard v. Connors, 92 S.Ct 509, 512 (1971), 404 U.S. 270, 275. This exhaustion doctrine is to prevent unnecessary conflict between state and federal

courts. Picard, 92 S.Ct. at 512, 404 U.S. at 275.

Minnesota's postconviction statute is consistent in that it is a remedy wherein the state court could rule on fundamental issues which had not been tried before those issues reached the federal court on habeas corpus. Case v. State, 364 N.W.2d 797, 801 (Minn. 1985); Fox v. State, 474 N.W.2d 821, 824 (Minn.1991). (A-59).

The rule that exists is that federal district courts should stay damages actions when there are related state proceedings pending because it allows federal courts to assume jurisdiction where jurisdiction properly exists on the portion of the federal court damages claims that will not be addressed in the state forums, it allows the state forums to first rule on or moot issues of federal constitutional law that will be relevant in both forums, and it prevents unnecessary interference with the state's legitimate activities.

In the case at bar, the Eighth Circuit erred in not remanding this tort and contract damages case back to the district court for a stay pending exhaustion of postconviction proceedings. This would allow the Minnesota proceeding to go forward without federal court interference on the issues that effect both proceedings, and the federal court would maintain its obligation to hold jurisdiction on the related and unrelated state law claims that cannot be addressed in the Minnesota postconviction forum. Res judicata or collateral estoppel may not be applicable here because the state of Minnesota was not represented in the federal court damages action and it has not waived its right to litigate the issues under Minn.Stat. § 590. In addition, if these rulings could be used in post-conviction proceedings, it would be "testing the legality of the conviction" which is forbidden under Minn.Stat. 590 Subd.(2) because it is drafted to be the exclusive remedy until it becomes ineffective, and the exhaustion doctrine will be circumvented. However, nothing would stop the federal court

rulings from being cited in postconviction proceedings under stare decisis or used in some way to persuade the parties or the courts. This would effectively be a federal court prematurely ruling on issues of federal constitutional law interfering with a state's legitimate adjudicatory interests circumventing the exhaustion doctrine. This could indirectly test the lawfulness of the conviction.

Moreover, if petitioner later brings a federal habeas corpus petition and the state takes the same positions as MBD, these prior rulings from the same federal court could be cited or used as persuasive authority to effectively bypass Congress's statutory intent in the federal habeas corpus statute in that the federal court ruled on the issues before state remedies were exhausted without waiver from the state. (28 U.S.C. § 2254 (b)). These prior rulings will influence the court and the parties just with mere knowledge of how that same court previously ruled. The doctrines of comity, federalism and state exhaustion will be upset. As Deakins requires federal court damages actions to be stayed pending the outcome of the related legitimate state proceedings, the Eighth Circuit erred in not remanding this case back to the district court to be stayed pending the outcome of postconviction proceedings.

II. THE EIGHTH CIRCUIT ERRED IN NOT REMANDING THIS CASE BACK TO THE DISTRICT COURT WITH A STAY BECAUSE THE ABSTENTION DOCTRINE APPLIES.

The Eighth Circuit erred in not remanding this case back to the district court with a stay because the abstention doctrine prevents the federal court from ruling on issues that would effectively bind the state court. Samuels v. Mackell, 401 U.S. 66 (1970); Younger v. Harris, 91 S.Ct. 746 (1971), 401 U.S. 37. In Mackel, the Supreme Court affirmed a lower court dismissal of a federal court declaratory judgement action which sought to declare a state statute unconstitutional because such declaratory relief would effectively bind the

ongoing state court prosecution charging violation of that state statute making a federal court decision a form of equitable relief effecting the state proceeding. Mackell, 401 U.S. at 73-74. Similarly, in Younger, the Supreme Court held that federal courts also should abstain from issuing equitable relief injunctions stopping state court prosecutorial matters on federal grounds under the principles of federal-state comity. Younger, 91 S.Ct. at 750, 401 U.S. at 44. Generally, federal courts should not decide fundamental equal protection claims where an anticipated state court ruling could moot the federal constitutional question. Railroad Commission of Texas v. Pullman, 312 U.S. 496, 498, 61 S.Ct. 643, 644 (1941).

Rather than have federal courts interfere with Minnesota's legitimate habeas corpus policy, it is prudent to allow the state courts to make certain rulings where the postconviction court would be in the best position to make them because it was the criminal trial court. Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct.1098 (1943).

The rule derived is that federal courts should not interfere by deciding the merits of issues where parallel issues are being properly litigated in state court protecting the state's legitimate interests in having its own adjudicatory process. Whether the abstention doctrine applies to federal court damages actions against former attorneys while parallel state court habeas corpus proceedings are pending has been specifically left open by the Supreme Court. Heck v. Humphrey, 114 S.Ct. 2364, 2373-FN8(1994), 512 U.S. 477, N8. Petitioner contends that the tort and contract claims have the constitutional merits of the unraised direct appeal issues bootstrapped to them by Minnesota tort and contract law.

In Minnesota, the standard of legal malpractice is that clients may recover all damages that the attorney's negligence proximately causes. Gustafson v. Chestnut, 515 N.W.2d 114, 116 (Minn.App. 1994). (i.e. retaining a new attorney). If claims

are waived for failure to bring in the direct appeal, plaintiff must show that he would have been successful in the underlying action. Rouse v. Dunkley, 520 N.W. 2d 406, 408 (Minn.1994), Patten v. Ruttger, 1994 WL 200599 at *2(Minn.App. 1994) (A-52). In addition, petitioner experiences damages resulting from breach of contract that just deal with the expectations of the parties and have nothing to do with constitutional merit. Accordingly, petitioner's damages must be categorized into three types to determine whether abstention applies to this civil damages action.

A. Damages claims arising from breach of contract that only take into account the parties contractual expectations that will not test the validity of the conviction and will not impede on the state's right to first decide the constitutional merit of the issues, should be stayed under Deakins. In order to properly gauge compensatory damages (expectation, nominal, consequential and punitive), there are factual questions as to the parties expectations under the contract. (A-57). This helps the trier of fact determine how to put the nonbreaching party in the same position had there been no breach and it helps the trier of fact determine what was reasonably in contemplation of the parties when the contract was made.

In the case at bar, the Eighth Circuit erred in affirming the dismissal on the pleadings because there was no discovery to determine the parties expectations under the contract and the damages resulting from the alleged breach. These are factual questions where dismissal on the pleadings is error. These factual issues have little to do with the actual constitutional merit of the issues MBD omitted to raise. Nor does such fact finding attack the validity of the conviction. These claims are in fact very much like some of the civil rights and pendent state tort claims made in Deakins v. Monaghan, 108 S.Ct. at 526, 484 U.S. at 196-197 because they cannot be raised in the state forum. Petitioner contends that the district court

should have exercised jurisdiction over these claims and ordered a stay pursuant to Deakins v. Monaghan, 108 S.Ct. at 523, 484 U.S. at 193, 202. Petitioner requests that certiorari be granted.

B. Abstention applies to the claims for damages resulting from waived claims for failure to bring in the direct appeal because rulings can call the conviction into question. Petitioners claims against MBD that test the validity of his conviction should be stayed under the abstention doctrine. Edwards v. Balisok, 117 S.Ct. 1584, 1585 (1997), Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994), (See Also, Penson v. Ohio, 488 U.S. 75, 85 (1988), 109 S.Ct. 346, 352, holding that a successful appellate argument makes the conviction unlawful.) Perhaps not to the res judicata extent the declaratory judgement would have had in Mackell in that Minnesota was not a party to this federal court malpractice action. However, nothing could prevent parties in parallel postconviction proceedings from citing the federal court rulings under stare decisis, or prevent the parties from using the rulings as persuasive authority simply with mere knowledge of how the federal court ruled on the merits of these claims thereby taking the issues away from the state's legitimate interest in deciding them first.

Abstention would prevent inconsistencies between the federal and state courts, it preserves the principles of federalism, and it prevents interference with a state's legitimate activity. Deakins v. Monaghan, 108 S.Ct. at 209, 484 U.S. at 533, Justice White concurring. As Justice White points out, damages claims in federal court can impede on the state court as much as declaratory judgement actions or other requests for equitable relief. Deakins v. Monaghan, 108 S.Ct. at 533. Further, should petitioner bring a federal habeas corpus petition and the state takes the same positions as MBD, although probably not res judicata, these prior rulings from the same federal court could be cited or used as

persuasive authority to effectively bypass Congress's statutory intent regarding the federal habeas corpus statute in that the federal court ruled on the issues before state remedies were exhausted. (28 U.S.C. § 2254 (b)). These prior rulings may influence the court and the parties just with mere knowledge of how that same court previously ruled. The doctrines of comity, federalism and state exhaustion will be upset. Even without Younger, Pullman, or Burford abstention, a federal court may postpone jurisdiction for other prudential considerations such as preserving the uniqueness of habeas relief by separating it from damages actions protecting the adjudicatory interests of both the state and the prisoner. Colorado River Water Conservation District v. United States, 96 S.Ct. 1236, 1247, 424 U.S. 800, 819 (1976).

Because the practical effect of federal court rulings in damages action and federal court rulings in equitable relief actions can be substantially similar, and because there are other prudential considerations for the district court to refrain from ruling on these constitutional issues with pending habeas corpus proceedings, the Eighth Circuit erred under the abstention doctrine or Colorado River in not remanding this case back to the district court with a stay pending the exhaustion of postconviction proceedings. Deakins v. Monaghan, 108 S.Ct. 529, 484 U.S. 208. Petitioner requests that certiorari be granted.

C. Abstention may apply to some claims for damages that do not require a showing of success in the underlying action when these damages claims are related to the unraised direct appeal issues and become questions of law. Even when a showing of success in the underlying action is not required, a legal malpractice case may still ultimately turn on whether a reversal would have resulted to determine the tort elements of duty, causation and damages which could be decided as a matter of law when reasonable minds could arrive at only one conclusion. Gustafson v.

Chestnut, 515 N.W.2d 114, 116 (Minn.App.1994). This would indirectly decide the constitutionality of the omitted appellate issues. Just as damages actions resulting from lost legal claims may be encompassed in the abstention doctrine because there would have to be a showing of merit for a valid claim, some contract expectations and tort foreseeability are substantially capable of being decided as a matter of law which could result in an indirect, premature federal constitutional ruling on the merits of the issues. Petitioner contends that the Eighth Circuit erred in not remanding this case back to the district court to be stayed under the abstention doctrine. Deakins v. Monaghan, 108 S.Ct. at 529, 484 U.S. at 202. Petitioner respectfully requests that certiorari be granted.

III. THE COURT OF APPEALS ERRED IN NOT REMANDING THE CASE BACK TO THE DISTRICT COURT BECAUSE THERE WAS NEVER AN INITIAL DETERMINATION AS TO WHETHER A JUDGEMENT IN THE MALPRACTICE ACTION WOULD NECESSARILY TEST THE VALIDITY OF THE CONVICTION.

The Eighth Circuit erred in not remanding this case back to the district court because there was never an initial determination as to whether a judgement in the legal malpractice action would test the validity of petitioner's conviction. Minnesota Statute 590.01 Subd. 2 provides:

> [Postconviction] remedy takes the place of any other other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition. Minn.Stat. 590.01 Subd. 2.

Although petitioner contends that no Minnesota case law exists deciding the question whether a legal malpractice action against former attorneys challenges the validity of the conviction, the Supreme Court has ruled that federal court plaintiffs seeking 42 U.S.C § 1983 redress are barred if a judgement in their favor would indirectly call into question the validity of their existing convictions. Edwards v. Balisok, 117 S.Ct. 1585 (1997), Heck v. Humphrey, 512 U.S. 477, 487, 114 S.Ct. 2364, 2372-2373 (1994). In Heck and Edwards the Supreme Court found that reversal of the conviction was an essential element to ground a convict's 42 U.S.C. § 1983 action when the § 1983 action itself has elements that are elements grounding the conviction.

As there is no applicable Minnesota case law as to whether a legal malpractice action necessarily demonstrates the invalidity of a conviction, Edwards and Heck do shed some light. Although these cases are not dispositive as to the commingling of Minnesota tort law and the Minnesota habeas statute, in Penson v. Ohio the Supreme Court held that a successful appellate argument attempts to demonstrate that a conviction is unlawful. Penson v. Ohio, 488 U.S. 75, 85(1988), 109 S.Ct. 346, 352.

It is apparent under Minn.Stat. 590 that whether a legal malpractice action for failure to raise constitutional issues in a criminal direct appeal challenges or tests the validity of a conviction is a threshold matter that must be decided before the court decides the merits of the claims. The district court erred in not deciding the threshold matter of Minn.Stat. 590.01 Subd.2, and the Eighth Circuit erred in not remanding this case back to the district court to decide the threshold. Although the Eighth Circuit affirmed a dismissal, it is unclear from the Order whether it considered the threshold matter under Minn.Stat. 590.01 Subd. (2).

Petitioner contends that this matter should be remanded back to the district court for a determination of the threshold matter. Or alternatively, and probably more appropriately to protect against erroneous construction of Minnesota law, postpone the entire federal case with a stay pending the outcome of the Minnesota postconviction proceedings because the Minnesota courts may render the federal court's consideration of these issues moot with a reversal or an affirmance. England v. Medical Examiners, 375 U.S. 411, 416 FN-7, 84 S.Ct. 461, 465 FN-7. See, Patten, Ruttger, 1994 WL 200599 (Minn.App.) (A-52). In addition, the district court erred in not first deciding the threshold matter of whether its rulings effect a potential federal habeas corpus action. For example, if the state's attorney would argue the same points as MBD did (A-32, lines 12-21), this would effectively bypass the state exhaustion threshold requirement of the federal habeas corpus statute. 28 U.S.C. 2254(b). As the district court never decided this threshold matter (A-35 lines 23-25, A-36), the district court erred in moving to the merits of the issues and the Eighth Circuit erred in affirming the dismissal without explanation. Petitioner respectfully requests that certiorari be granted.

IV. THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S JUDGMENT OF DISMISSAL WITHOUT HOLDING EITHER THAT THE DISTRICT COURT ERRED IN ADDRESSING THE MERITS OF THE ISSUES OR THAT THE DISTRICT COURT ERRED IN FINDING THE ISSUES MERITLESS.

A(1). MBD was negligent and breached its contract in not raising the Batson claim. (A-57). "By denying a person participation in jury service on account of race, the State unconstitutionally discriminated against the excluded juror." Batson v. Kentucky, 476 U.S. 79, 87, 106 S.Ct. 1712, 1718, (1986), citing Strauder v. West Virginia, 100 U.S. 303 (1880). A defendant's standing to assert the

stricken juror's denial of Equal Protection serves to protect the rights of the stricken juror and the integrity of the judiciary. Batson, 476 U.S. at 84-87, 106 S.Ct. at 1718; Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct.1029 (1972); Holland v. Illinois, 110 S.Ct. 803, 811 (1990), 493 U.S. 474; Powers v. Ohio, 111 S.Ct.1364 (1991).

In the case at bar, the criminal trial court and the federal district court erred in ruling that the purpose of Batson's requirement of racial identity between the stricken juror and the defendant is to establish an inference of racial prejudice that was subsequently eliminated by Powers v. Ohio. (A-32 lines 12-21 and A-43). Petitioner contends that this is plain error. The requirement in Batson for racial identity between the stricken juror and the defendant exists to determine whose Equal Protection rights have been violated. In Batson it was the defendant's because the defendant would never have a chance to be tried with members of his race sitting on the jury when the state prosecution is predisposed to strike black jurors. This treats that defendant differently than defendants of other races who would still have a chance to be tried by members of their own race when the state prosecution is predisposed to remove black jurors. (See Strauder). In Powers the racial identity requirement of Batson was not used because Powers was raising the Equal Protection rights of the black stricken juror which are violated if the state prosecution is predisposed to strike black jurors because the stricken black jurors would be treated differently than jurors of other races because they would not get a chance to sit on juries.

Both the federal district court and the trial court found that the state prosecution could never have a discriminatory motive against a black juror when there is a white defendant because both courts misapplied Batson's requirement of racial identity between the defendant and juror. (A-32 lines 12-21 and A-43). The criminal trial court

applying Batson held, petitioner never could make a prima facie showing of discrimination because petitioner was Caucasian and the juror was African American. (A-43) The federal district court similarly stated that both parties are in agreement regarding the prosecutor's alleged proffered explanation that under the circumstances of the case (black juror/ white defendant), the prosecutor merely stated that there could not be a racial motive against the juror because it was not a same race situation. (A-32 lines 12-21). Both the federal district court and the trial court erred in analyzing this Equal Protection question by misplacing the purpose of Batson's same race requirement. This further prevented both courts from properly applying other Batson doctrines such as the insufficiency of merely denying discriminatory intent and whether an inference of racial prejudice against the stricken juror existed. Accordingly, if MBD directly appealed to the United State's Supreme Court, it is uncontroverted that petitioner's conviction would have been reversed. Petitioner respectfully requests that certiorari be granted.

A(2). MBD was also negligent and breached the contract in not raising that the need to establish an inference of racial prejudice was moot. Garret v. Morris, 815 F.2d 509 (8th Cir. (Mo.) 1987)(U.S. cert.denied, 484 U.S. 818 (1987). In Garret, the court held that where a prosecutor volunteers or justifies the strike, the presumption of correctness falls away and the trial court must require a race neutral explanation for the strike. Garrett 815 F.2d at 511. In Alexander v. Louisiana, 92 S.Ct. 1221, 1226 (1971), the Court held, "[N]or may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive."

At bar, the prosecutor justified his peremptory strike which compelled the trial court to demand a race neutral explanation which it failed to do. (A-32 lines 12-21). The

prosecutor justified the strike by stating that racial prejudice against the stricken juror can automatically be dismissed because the excluded juror and the defendant do not share the same race. Accordingly, the court had a duty to ensure that the strike was not a pretext for discrimination. Merely denying discriminatory intent as the prosecutor did is insufficient as a matter of law. The burden had switched to the prosecution to provide a race neutral explanation which the trial court erred in not demanding. Accordingly, MBD was negligent and breached its contract in not raising the Batson issue because it is uncontroverted that a direct appeal to the United States Supreme Court would have lead to a reversal on the Batson issues. In addition, petitioner's contractual expectations are questions of fact that were erroneously decided on the pleadings without discovery. Petitioner respectfully requests that certiorari be granted.

B. MBD was negligent and breached its contract in not raising the jury bias issues. The criminal trial court committed reversible error in not allowing defense counsel to question juror Longson on her desire to hear what the defendant had to say. "[T]he right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will and suffer no penalty . . . for such silence" [is a Constitutional Guarantee]. Malloy v. Hogan, 378 U.S. 1, 8 (1964). "[The] preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." Smith v. Phillips, 455 U.S. 209, 216 (1982). "A searching voir dire is a necessary incident to the right to an impartial jury." United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). "In exercising its discretion, the trial court must be zealous to protect rights of an accused." Dennis v. United States, 339 U.S. 162, 168 (1950). The voir dire process is one of the most effective means of exposing any latent bias and the voir dire process is necessary to exercise challenges in

an informed manner. United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). "There is no doubt that the trial judge has the duty to neutralize the effect of any known area of prejudice." Bear Runner, 502 F.2d at 910.

In Bear Runner, during the voir dire, the trial judge would not allow the specific probing of potential bias towards Native Americans except for general inquires by the court asking the jurors if they could be impartial. Id. at 911. In reversing, the Eighth Circuit held, "It is fundamental that any erosion of the right to extensively examine veniremen in order to secure a fair impartial jury constitutes prejudicial error." Bear Runner, 502 F.2d at 913.

In the case at bar, the trial court did not allow defense counsel to probe Longson's bias in "wanting to hear what the defendant had to say". After the court properly gave the "right to remain silent instruction", Juror Longson on her own volition again said, "I would like to hear what the girl, the man and the young man have to say." After Longson brought up her bias again, defense counsel began questioning her on the defendant's right to remain silent again as every lawyer should. The prosecutor objected to the defense counsel's question. The court improperly sustained the objection. Defense Counsel then immediately stated, "Judge, I think there is a Fifth Amendment issue here and I have a right to–". The court interjected and did not reconsider its ruling.

Petitioner had a Constitutional right to remain silent at the start of the trial. Juror Longson did not comprehend the Court's instruction that he had such a right when she again brought up her bias. When the Court sustained the prosecutor's objection, it was not zealous in protecting the rights of the accused, it did not allow a "searching voir dire" to ensure an impartial jury, and it did not exercise its "duty" to neutralize the effect of any known prejudice. The trial

court acted as the court in Bear Runner in not allowing the defense to extensively probe an area of bias which prevented the securing of an impartial jury.

The fact that defense counsel did not exercise a challenge and that petitioner decided to testify does not affect the showing of prejudicial reversible for two reasons. Firstly, a challenge for cause would have been futile because the court ruled that the question had been asked and answered. Forcing counsel to use a peremptory is prejudicial and he was not allowed to further question that bias to determine for himself if Longson was acceptable. Secondly; petitioner did not **start** the case with an unbiased jury. In Johnson v Armontrout, 961 F.2d 748 (8th Cir. 1992), the Court held that, "[W]hen a defendant fails to object to the qualifications of a juror, he is without remedy only if he fails to prove actual bias." Id. at 754. "If the defendant proves that jurors were actually biased, the conviction must be set aside." Johnson, 961 F.2d 754-755.

> A defendant charged with a crime is entitled to an unbiased jury and is entitled to a presumption of innocence until such time as he is proven guilty beyond a reasonable doubt . . . Are only the innocent entitled to an unbiased jury or does the right of due process also entitle the guilty to an impartial jury? This court is of the opinion that both the innocent and the guilty are entitled to **start** a trial without any member of the jury convinced of his guilt. Johnson v. Armontrout, 961 F.2d 748, 755 (8th Cir. 1992).

The trial judge must ensure that the jurors have been instructed on and can **reasonably** understand a defendant's right to remain silent to keep any conceivable juror speculation to an absolute minimum. Carter v. Kentucky, 450 U.S. 288, 303, 101 S.Ct. 1112, 1120 (1981).

In the case at bar, passing on the jury array is irrelevant. "Wanting to hear what the young man had to say" particularly after the court gave the instruction, is actual bias. Petitioner did not **start** the criminal trial with an impartial jury which denied him a fair trial. When the case started, Ms. Longson was looking at petitioner wondering what he was going to say while the state was presenting its case. The trial court did not attempt to keep such speculation to an absolute minimum. Accordingly, MBD was negligent and breached its contract in not raising this juror bias issue because raising it on direct appeal to the United States Supreme Court would have lead to a reversal. In addition, petitioner's contractual expectations and damages are questions of fact that were erroneously decided on the pleadings without discovery. Petitioner requests that certiorari be granted.

C. MBD was negligent and breached the contract in not raising ineffective assistance of trial counsel. At the criminal trial, petitioner was denied effective assistance of trial counsel under the Strickland standard as trial counsel did not exercise any challenges against biased jurors. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). Cousel's decision to seat these jurors was unreasonable demonstrated by reviewing the record or by the doctrine of implied bias. Actual bias need not be shown in certain egregious situations. Johnson v. Armontrout, 961 F.2d at 756. Implied bias standards have been adopted in certain situations where the juror is close to someone who has been involved in a similar fact pattern. In Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991), a juror sitting in a murder trial where the defendant's defense was battered wife syndrome was presumed to be biased because the juror herself was involved in an abusive family situation. In United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979), the court presumed that a juror whose sons were currently imprisoned for heroin-related crimes could not remain impartial during a heroin conspiracy trial. In United States v. Allsup, 566 F.2d 68 (9th Cir. 1977),

the court presumed bias of jurors who worked in one of the banks that defendant allegedly robbed. In Jackson v. United States, 395 F.2d 615 (D.C. Cir. 1968) the court held that a juror was presumptively biased because he had been the participant in a love triangle similar to the one at issue. In United States ex rel DeVita McCorkle, 248 F.2d 1 (3d Cir.1957), the court imputed bias to a juror in a robbery case because she had been the victim of a robbery. In Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992), jurors who were burglarized during a burglary trial were presumed biased. In State v. Larue, 722 P.2d 1039 (Hawaii 1986), the court held that a juror's statement in deliberations regarding her personal experience with child abuse to buttress reliability of a child's testimony violated defendant's right to a fair trial.

In the case at bar, it is unreasonable for defense counsel and the trial court to allow all of these jurors to sit. Herzog-Lowery testified that she was robbed at gunpoint one week earlier. (Tr. I 51, 18-20.) Jaggers testified that her mother's house had recently been broken into and that she herself had money stolen. (Tr. I 60, 15-18) Longson on her own volition, testified that her niece, that she indicated was as close to her as a daughter, had been abducted and that "something bad happened" as well as her clear inability to understand the defendant's right to remain silent. (Tr. I, 245-249) Welch testified that his daughter had been molested. (Tr. I 58, In 13-15.) Salek testified that she was shocked over the bizarre nature of the story when she read it in the papers and when asked if she could put it aside she said three times that she would "attempt to do so" and "I think so." (Tr. I 77, lines 6-10.) Salek also testified that she had **strong feelings about date rape** which she was not sure how that would **"affect her judgment"**, that she was afraid that she was going to get obsessed with the case because it was negative, and that she dwells on matters such as this and **"can't change gears"**. (Tr. I-284, In 10-22, 281, lines 1-10). **Van testified that her sister was raped.** (Tr. I 96, lines 4-7.) Wilcox testified that she had

worked with a female student who had been the victim of a sexual assault as well as having worked with the prosecutor's brother. (Tr. I 306 and 308.) Salek was so obviously and clearly biased towards appellant the prosecutor did not even bother voir diring her. (Tr. I 296, line 8). As to the other jurors with previous rapes, abductions, assaults at gun point and sexual assaults on immediate family members, clearly these jurors should not have been sitting for the trial.

Defense counsel was objectively deficient in allowing all these jurors to sit. There is a reasonable probability that the outcome of the trial would have been different had petitioner received effective assistance of counsel in light of the fact that both codefendants, who admitted to having sex with the girl after petitioner, were both acquitted where it was consistently testified to by Ms. Shadden in both trials that petitioner was the least culpable. The jury was prejudicial to the facts of the case and defense counsel was deficient in not attempting to remove any of these jurors. Moreover, because these jurors are presumptively biased, prejudice is presumed under the Strickland standard. Accordingly, MBD was negligent and breached the contract in not raising ineffective assistance of trial counsel in the direct appeal because a direct appeal to the United State's Supreme Court would have lead to a reversal. In addition, petitioner's contractual expectations were questions of fact making 12(b)(6) dismissal improper without any discovery. Petitioner requests that certiorari be granted.

D. MBD was negligent and breached the contract in not raising juror bias from preformed opinion. Bias can be imputed on a juror if he has a formed opinion about the case prior to trial. Irvin v. Dowd, 366 U.S. 717, 722 (1961); See also, Murphy v. Florida, 421 U.S. 794, 799 (1975). This does not mean that qualified jurors must be totally ignorant of the facts and issues in the case prior to trial; however, the juror must show that prior impressions can be laid aside and a

verdict rendered solely on the evidence in court. Murphy, 421 U.S. at 800; See also, Reynolds v. United States, 98 U.S. 145, 155 (1879). Even a juror's unequivocal answer of impartiality is not necessarily dispositive. Irvin 366 U.S. at 728.

In the case at bar, juror Salek shows a preformed opinion partly emanating from pretrial publicity which should have disallowed her from serving on the jury. Salek testified that she obsesses with anything negative; she dwells on things that are negative in nature; that she has strong feelings about date rape; that she was not sure how this would affect her judgement in this case (Tr. I 284, lines 13-15); that the perpetrator bears the main responsibility here; that she "can't change gears"; and that she was shocked over the bizarre nature of the story when she read it in the paper. (Tr. I 281-284 and Tr. I 76-77.) When asked if she could put it aside, she said she would "attempt to do so" and "I think so" three times. (Tr. I 77).

Salek does not give a reasonable response to the question of impartiality. She admits that her judgement is affected and she responds extremely tentatively three times to the question as to whether she could be impartial. Ms. Salek's responses make her circumstances more skeptical than the in Irvin where at least in Irvin the juror gave an absolute response to the question as to impartiality. Ms. Salek admitted that her prior impressions could not be laid aside to render a verdict solely on the evidence. The response, "I think so" and "I will attempt to do so" and "I think so" is too tenuous particularly in light of the fact that Salek herself admitted she was not sure how her opinions were going to affect her judgment. (Tr. I 77, App. I 284). **Salek was so obviously and clearly biased the prosecutor did not even bother voir diring her. (Tr. I 296, line 8).** As Ms. Salek was unfit to serve as a juror due to pretrial publicity that she could not lay aside, the trial court erred in not removing her and defense counsel was deficient under the Strickland standard in not removing her.

Accordingly, MBD was negligent and breached the contract because a direct appeal to the United States Supreme Court raising Salek's biases would have lead to a reversal. In addition, contractual expectations and damages are questions of fact making 12(b)(6) dismissal inappropriate. Petitioner requests that certiorari be granted.

V. THE EIGHTH CIRCUIT ERRED IN AFFIRMING THE 12(b)(6) DISMISSAL BECAUSE THERE WAS NO DISCOVERY OR RECORD EXPANSION.

The standard of review for an ineffective assistance of counsel claim is a mixed question of fact and law. McCauley-Bey v. Delo, 97 F.3d 1104, 1105 (8th Cir. 1996), cert. denied, 117 S.Ct. 1453. A Court that decides an ineffective counsel claim must make a hypothetical construct adding the "new" proffered testimony and evidence to the existing body of original trial evidence gauging the likely outcome of the legal action with the expanded body of evidence. McCauley-Bey, 97 F.3d at 1105. In an attorney malpractice case where an element of making a prima facie case is success in the underlying action, the jury must determine whether the evidence of negligence and the probable results of that negligence presented at the malpractice trial show by a preponderance of the evidence that the original action would have had more favorable results for the plaintiff bringing the malpractice action if the attorney had not been negligent. Morris v. Getscher, 708 F.2d 1306, 1310 (8th Cir. 1983). In Minnesota regarding summary judgment and motions to dismiss legal malpractice actions, when the court considers matters outside the pleadings, if the motion is termed a motion for summary judgment, the court must treat the motion as a motion to dismiss on the pleadings and if discovery would be needed, dismissal or summary judgment is inappropriate. Cook v. Connolly, 366 N.W.2d 287 (Minn.1985). Rule 12(b)(6) also requires the opportunity for discovery when the court converts a 12(b)(6) motion to a summary judgement by

considering matters outside the pleadings. (A-35, A-58).

Determining the parties expectations under a contract is a question of fact which requires discovery to determine the parties contractual expectations. (A-56). The negligence elements, standard of care, causation, and damages are also factual questions for a jury. Admiral Merchants v. O'Connor & Hanna, 494 N.W.2d 261, 266 (Minn.1992); Gustafson v.Chestnut, 515 N.W2d 114, 116 (Minn.App.1994).

In the case at bar, the Eighth Circuit erred in affirming the district court's judgement of dismissal on the pleadings because discovery has been barred. Even MBD admitted to the district court that discovery was going to be needed to determine trial and appellate strategy if the court determined that the cause of action was not premature. The issue of whether MBD should have raised the constitutional claim of ineffective assistance of trial counsel necessarily depends on discovery or a hearing so the court may determine the initial mixed question of fact and law. McCauley-Bey, 97 F.3d at 1106. Without discovery or record expansion, the district court cannot make the threshold determination of whether trial counsel was ineffective. Without the initial determination properly done, the district court erred in moving on to whether MBD should have raised ineffective assistance of counsel in the direct appeal or possibly move for post conviction relief. See Garasha v. State, 393 N.W.2d 20 (Minn.App. 1996). Accordingly, the federal district court erred in dismissing this case on the pleadings and the Eighth Circuit erred in affirming the judgement of dismissal without explanation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that certiorari be granted.

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Attorney for Petitioner

September 17, 1997

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Christopher A. Tsipouras,

Plaintiff,

vs.

James M. Grochal, Meshbesher, Birrell & Dunlap, Ltd., et al.,

Defendants.

CASE NO: Civ. 4-95-924

DEFENDANTS' MOTION FOR DISMISSAL

Motions in the above-entitled matter came on before the Honorable James M. Rosenbaum, a Judge of the above-named Court, on Friday, the 2nd day of August, 1996, at the Federal Court House, Minneapolis, Minnesota, commencing at the hour of 9:20 a.m.

APPEARANCES:

For Plaintiff: Mr. Frank A. Delle Donne, Esq.
Mr. David P. Chameli, Esq.

For Defendants: Mr. Thomas J. Shroyer, Esq.

Court Reporter: Stephen J. Amon

THE COURT: All right.

MR. DELLE DONNE: And that's a bias.

THE COURT: You may conclude.

MR. DELLE DONNE: Your Honor, based on these issues, which we think and we, looking at it front an objective standpoint, the standpoint of reasonableness, feel that Meshbesher, Birrell & Dunlap should have raised these issues in the appeal. The issues that they raised were issues that the prosecutor rolled his eyes and other issues that really had no merit when compared to these other constitutional issues, and we feel that the appeal was improper. We feel that had these issues been raised in the underlying appeal, the conviction would have been reversed, and we feel that we can make a showing based on the brief that we would have been successful in the underlying appeal, which is all that is required for a negligence malpractice case at this point in Minnesota.

THE COURT: Thank you, Counsel.

The defendants have moved to dismiss this matter pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Their motion is granted.

On December 13, 1989, just a bit under seven years ago, a Hennepin County Grand Jury or a Hennepin

County jury convicted the plaintiff, one Christopher Tsipouras, of two counts of Criminal Sexual Conduct. He was represented at that trial by defendant James Grochal.

After his sentencing, he retained the defendant firm in this case, Meshbesher, Birrell & Dunlap, MBD as I will refer to them, to represent hi on appeal.

The Minnesota Court of Appeals heard and considered the appeal and rejected each of the then claimed errors, the court itself finding, quote, strong evidence of Tsipouras' guilt, closing the quote, and reference here is State versus Tsipouras, Number C7-90-708, 1991, Westlaw 1942 at 3, Minnesota Court of Appeals, January 15, 1991, Minnesota Supreme Court denied review February 20 that same year.

The defendant brings a claim, and it is questionable, because there is no established law either asserting whether or not such a claim can be brought. He seeks to impose tort liability on his appellate counsel for failing to bring a motion which would not have exonerated him but would have provided a new trial.

There has not been a preliminary motion before the Minnesota courts that's been completed

either for habeas or for post-conviction relief.

Now, on December 13, 1995, Mr. Tsipouras, through his counsel, filed the present action. Counsel, for reasons known to him, chose to proceed in the United States District court as opposed to seeking, at that time, either habeas or post-conviction relief under Minnesota statutes.

In his Complaint, he asserts that MBD and its attorneys, Andrew Birrell, John Leunig and Steven Meshbesher, committed legal malpractice by failing to raise on their appeal a number of claims. The first, that the prosecutor exercised a preemptory challenge in violation of Batson versus Kentucky, a case at 476 United States 79, 1986, that the jury was biased, and third, that trial counsel provided ineffective assistance of counsel.

Tsipouras further alleges MBD and its attorneys committed legal malpractice and breach of a contract by rendering ineffective assistance of counsel on their own.

Tsipouras has dismissed what he now recognizes as his improvident claims against Mr. Grochal, who has immunity. Obviously an issue not previously examined before the claim was filed against him.

Now, MBD and its counsel now argue that Tsipouras' claims must be dismissed, asserting that their failure to raise particular issues on appeal did not proximately cause Mr. Tsipouras' damages, which, in their view, was his conviction of a felony for having committed sexual misconduct.

Now, a court, of course, couldn't grant a motion to dismiss under Federal Rule 12(b)(6), quote, unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief, closed quote, citing Morton versus Becker at 793 Fed. 2d, 185, 187, Eighth Circuit, 1986.

When the court considers a motion to dismiss, it must, quote, take the well-pleaded allegations of the Complaint as true and construe the Complaint and all reasonable inferences arising therefrom most favorably to the pleader, closing that quote. That is from Morton versus Becker.

Here the court finds that Mr. Tsipouras can present no set of facts that would support his legal malpractice claim. To prevail on a legal malpractice claim, he must show that his lawyer acted negligently, thereby proximately causing his damages. That's Rouse versus Dunkley and Bennett, 520 NW 2d at 406, at 408, Minnesota, 1994. Plaintiff

must also show that but for his lawyers' negligent conduct, he would have been successful in the underlying action.

He has made and can make no such showing. First it is clear that even if MBD and its attorneys had presented the Batson issue to the Court of Appeals, Tsipouras' conviction would still have been affirmed. At trial, the prosecutor used a preemptory strike to remove an African-American from the jury. Grochal moved for mistrial pursuant to Batson. The trial court denied the motion after agreeing with the prosecutor that Tsipouras had failed to raise an inference that race was based or that the strike was race based.

Now, to obtain relief under Batson, the defendant must first show, and it is the defendants' burden to show, that the prosecutor exercised a preemptory challenge on a racial basis. Cite State versus Gaitan, 536 NW 2d, 11 at 15, Minnesota, 1995. If such a showing is made, well, then, the prosecutor is called upon to render a race neutral explanation for the strike. The trial court is then called upon to make a preliminary determination of whether there has been at least the threshold to make further examination and to show whether or not the defendant

has proven purposeful discrimination. If the prosecutor volunteers reasons for the strike, of course, the court must examine the prosecutor's stated reasons to determine whether or not they are pretext for discrimination, citing Garrett versus Morris, 815 Fed. 2d, 502 and 511, Eighth Circuit. That's denied certiorari at Jones versus Garrett at 484 U.S. 898, 1987.

Now, here, Tsipouras contends that the prosecutor volunteered a reason for his preemptory challenge, and it is his view that the trial court erred in not examining his stated reasons. Both parties agree, however, that the prosecutor said only that under the circumstances of the case, it did not raise an inference of racial prejudice.

Under those facts, it cannot be said that the prosecutor attempted to justify a strike of an African-American venireperson. Rather, the prosecutor merely asserted that Tsipouras had not met his burden under Gaitan. The court itself who heard the case concurred.

Accordingly, the court finds that the Batson issue would have provided no basis for the grounds for the relief which is sought here.

Second, Tsipouras' claim of juror bias is

without. merit. He contends that a juror was biased against him based on her statement during voir dire that she wanted to hear his explanation concerning the criminal charges despite his Fifth Amendment right to remain silent. Tsipouras, however, testified at the trial. Thus, even if MBD and its attorneys had raised the issue on appeal, his conviction would have been affirmed. He testified, and, therefore, even if there had been a question, it would have been taken care of, citing here State versus Stephanie at 354 NW 2d, 827 and 829, Minnesota, 1984.

Beyond that, however, the juror, if in fact the juror indicated improvidently or improperly that they wished to hear, was instructed by the court and indicated that she would have sat there and listened to the court's instructions and followed the instructions.

Under those circumstances, no claim is stated on that point.

Third, the opinion of the Court of Appeals renders and reveals that the ineffective assistance of counsel could not have prevailed. To succeed on such a claim, a defendant must show that he received ineffective assistance which was

prejudicial to his defense. Here, I cite Strickland versus Washington, of course, at 466 U.S., 668 and 687, 1984.

Here, given the Court of Appeals' finding that the evidence of Tsipouras' guilt was substantial, it is clear that he would not have been able to show that any alleged trial ineffectiveness prejudiced his defense.

Finally, the court determines that Mr. Tsipouras can allege no set of facts that would show MBD or its attorneys rendered ineffective assistance of counsel. As I have now made clear, the issues he claims should have been raised on appeal would have afforded him no relief on his conviction. It is well established that an attorney pursuing an appeal is not bound to proceed on and advance every conceivable claim which his client might himself choose to advance.

He is entitled and obligated to make an independent legal determination. The issues that were raised were substantial, and to the extent they were or notwithstanding their substantiality, they were rejected on appeal, but here, simply because, on a six-year later review of the transcript, someone has found some things that they would like to further

consider, does not at all indicate professional malpractice.

As such, Tsipouras can neither show, cannot show either that MBD or its attorneys were ineffective or that their representation prejudiced his defense.

The court has made this determination based on 12(b)(6). The court has examined the settled transcript record and the settled law in Minnesota. There is a certain extent to which, by reviewing the transcript, it could be argued that the court went beyond the facts in the Complaint, but on a proceeding of this kind, the border between Rule 12 and Rule 56 is necessarily blurred.

The court, however, if it had to make independent fact determinations or sees no need to make independent fact determinations as we are dealing here with a cold record and settled law.

Accordingly, for the reasons that the court has determined on the basis of Rule 12, Tsipouras' claims against MBD and its attorneys are dismissed with prejudice.

The court does not offer an opinion at this time on the determinations made here and their effect, if any, on an application for post-conviction

relief or subsequent habeas corpus, and that will be the order of the court.

Thank you, Counsel.

(Whereupon, the proceedings concluded at 10:00 a.m.)

- - -

* * *

CERTIFICATE

I, Stephen J. Amon, certify that the above and foregoing 36 pages is a true, accurate and complete transcript of said proceedings.

Date: _____

_____

Stephen J. Amon, Court Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-95-CV-924

CHRISTOPHER A. TSIPOURAS ORDER

Plaintiff,

JAMES GROCHAL; MESHBESHER BIRRELL & DUNLAP, Ltd.; ANDREW BIRRELL; JOHN LEUNIG; STEVEN MESHBESHER; and JOHN DOE

Defendants Meshbesher, Birrell & Dunlap, Ltd. Andrew Birrell, John Leunig, and Steven Meshbesher move to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court heard oral argument on August 2, 1996. Based on the files, records and proceedings herein, and for the reasons set forth at the hearing, IT IS ORDERED that:

Dependants' motion is granted. This matter is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 5, 1996

/s/ JAMES M. ROSENBAUM
United States District Judge

FILED August 6, 1996
JUDGMENT ENTERED August 6, 1996
/s/ DEPUTY CLERK

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,
Petitioner,

vs.

Christopher A. Tsipouras,
Respondent

ORDER AND MEMORANDUM

File No. 89042484

The above-entitled matter came before the Honorable Philip D. Bush, Judge of District, upon Defendant's Petition for Post Conviction Relief.

On March 5, 1996, Petitioner filed a Petition for Post Conviction Relief. On June 12, 1996, this Court issued an Order requiring Petitioner to file a Memorandum of Law addressing several issues and the State to file a Response to Petitioner's Memorandum. On July 5, 1996, Frank A. Delle Donne, Esq., submitted a Memorandum of Law in Support of Petition for Post Conviction Relief on Behalf of Petitioner Christopher Tsipouras. On July 18, 1996, Lee Barry, Esq., Assistant Hennepin County Attorney, submitted an Answer to Petition for Post-Conviction Relief on behalf of the State.

The Court, upon the files, records, and proceedings herein, makes the following:

ORDER

1. Defendant's petition for post-conviction relief is denied, and his petition is dismissed.

2. The attached Memorandum is incorporated into this Order.

BY THE COURT

/s/ Philip D. Bush
Judge of District Court

Dated: 10/31/96

MEMORANDUM

1. Facts and Procedural History

On December 13, 1989, Petitioner Christopher Tsipouras was convicted of first degree criminal sexual conduct. On January 8, 1990, Petitioner was sentenced to an executed term of 120 months. On January 9, 1991, the Minnesota Court of Appeals affirmed Petitioner's conviction and sentence. On February 20, 1991, the Minnesota Supreme Court denied Petitioners request for review. On March 5, 1996, Petitioner filed a Petition for Post-Conviction Relief. In an Order filed on June 12, 1996, this Court ordered the parties to submit memoranda addressing several issues. Petitioner filed a Memorandum in Support of Petition for Post Conviction Relief on July 5, 1996. The State filed an Answer to Petition for Post-Conviction Relief on July 18, 1996.

In his Petition for Post-Conviction Relief, Petitioner contends that 1) the trial court erred in not granting defense counsel's motion for a mistrial due to a race-based peremptory strike by the prosecution; 2) the trial court erred in preventing defense counsel from probing jury bias; 3) Petitioner was denied effective assistance of trial counsel because his counsel did not exercise peremptory or for cause challenges against biased jurors; and 4) Petitioner was denied effective assistance of appellate counsel because his counsel failed to raise all possible issues on appeal. Petitioner has requested an evidentiary hearing on these issues. Petitioner requested that seven jurors be called at an evidentiary hearing to establish that they were "unfit to serve as a juror." It is unclear from Petitioner's request whether he also seeks to call the victim in this case, Holly Shadden, to establish that she "was not the victim of any sexual assault."

II. Analysis

Petitions for post- conviction relief are governed by Minn. Stat. §590.01-.06 (1994). Section 590.04, subdivision 1 requires the district court to grant a hearing on the issue raised in the petition "[u]nless the petition and the files and records of the record proceeding conclusively show that the petitioner is entitled to no relief , . . ." A petitioner seeking post-conviction relief has the burden of establishing facts that warrant a reopening of the case. State v. Kelly, 535 N.W.2d 345, 347 (Minn.1993). An evidentiary hearing upon a petition for post conviction relief is not required unless the Petitioner alleges such facts which, if proven by a fair preponderance of the evidence, would entitle him or her to the requested relief. Roby v. State, Roby III), 547 N.W.2d 354, 356 (Minn., 1996)(citing Rainer, 502 N.W.2d at 787). The facts alleged must be "more than argumentative assertions without factual support." Id.(quoting Beltowski v. State, 289 Minn. 215, 217, 183 N.W.2d 563, 564 (1971)).

The State argues that Petitioner is barred from raising the issues in his Petition because they were not raised on direct appeal. The district court may summarily deny a petition when the issues raised have previously been decided by the Court of Appeals or the Supreme Court in the same case. Minn.Stat. §(3) (1994). Moreover, the Supreme Court has consistently held that all matters raised in the direct appeal, or all claims known but not raised, will not be considered in a subsequent petition for post-conviction relief. State v. Knaffla, 309 Minn. 246, 252 243 N.W.2d 737, 741 (Minn. 1976). The Batson issue and the issue of the court not allowing further probing of juror bias were known but not raised at the time of the appeal. Nevertheless, the court will address these issues on the merits.

Direct appeal is not the most appropriate way to raise an ineffective assistance of counsel claim because the reviewing court does not "have the benefit of all facts concerning why

the defense did or did not do certain things." Roby v. State, 531 N.W.2d 482, 484 n.1 (Minn. 1995), (quoting State v. Zernechel, 304 N.W.2d 365, 367 (Minn. 1981)). The Supreme Court has previously considered ineffective assistance of counsel claims in post-conviction proceedings where the petitioner did not raise the claim on direct appeal. Scruggs v. State, 484 N.W.2d 21, 25 (Minn. 1992). Thus, even though Petitioner did not raise his ineffective assistance of counsel claim on direct appeal, he is not barred from raising it here.

A. Race based Peremptory Strike by the Prosecution

Petitioner claims that the trial court committed reversible error in not granting defense counsel's motion for a mistrial when the prosecution made a race based peremptory challenge. In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause forbids a prosecutor from challenging potential jurors because of their race. Id. at 89. In Batson, the Court established a procedure for courts to use in determining whether a challenge was based on race. First, the defendant must make a prima facie showing of discrimination on the part of the prosecution. Id. at 93-94. The defendant must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the jury panel members of the defendant's race. Id. at 96. In addition, the defendant must show facts that raise an inference that the prosecutor used his challenge to exclude jurors because of their race. Id. After the prima facie showing is made, the burden shifts to the prosecution to provide an explanation for the challenge. Id. at 97.

Petitioner claims that the Powers v. Ohio, 499 U.S. 400 (1991) decision allows him to make a Batson challenge even though he is Caucasian and the challenged juror is African American. In Powers, the United States Supreme Court determined that a defendant could make a Batson challenge even if the juror is of a different race than the defendant. Id.

Prior to the Powers decision, the Court had decided that new rules resulting from cases involving Batson challenges would not be applied retroactively. Teague v. Lane, Director, Illinois Dept. Of Corrections, 489 U.S. 288 (1989). "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. The two exceptions to the general rule are "certain kinds of primary, private individual conduct beyond the power of a law making body to proscribe", and " procedures without which the likelihood of an accurate conviction is seriously diminished." Id. at 310-13. Because the rule announced in Powers does not fit into either exception, it is not applied retroactively. Petitioner's conviction became final on February 20, 1991, when the [Minnesota] Supreme Court denied his request for review. Powers was decided in April 1991. Therefore, Powers does not apply to this case.

At petitioner's trial, the prosecution used a peremptory to dismiss an African American juror. Petitioner's counsel made a Batson challenge. The court found that Petitioner did not make a prima facie showing of discrimination because Petitioner was Caucasian and the juror was African American. Thus, the court did not require the prosecutor to provide any reason for the peremptory challenge. Because Powers had not yet been decided and is not retroactive, the procedures set out in Batson control. Petitioner's Batson challenge failed because petitioner is of a different race than the challenged juror. Petitioner is not entitled to post conviction relief based on any alleged race based peremptory strike.

B. Probing claims that the trial court committed reversible error in preventing his trial counsel from probing juror bias. A defendant must show the actual existence of an opinion that will raise the presumption of impartiality in order to dismiss a juror for cause. Irvin v. Dowd, 366 U.S. 717, 722, 723 (1961).

If the individual has formed a positive opinion about the defendant's guilt, he or she is incompetent to serve as a juror. Id. Therefore, the defendant must be allowed to extensively examine potential jurors in order to obtain a fair and impartial jury. See United States v. Bear Runner, 502 F.2d 908, 911 (8th Cir. 1974). If, during questioning, a potential juror indicates an ability to follow the court's instructions, and the court believes the juror, the juror may properly serve. State v. Graham, 371 N.W. 204, 206-07 (Minn. 1985).

Petitioner contends that his attorney was not allowed to fully examine juror Longson about Petitioner's right to remain silent. Mr. Grochal asked Ms. Longson the following questions:

> Mr. Grochal: Would you expect my client to testify?
> Ms. Longson: It would be nice to hear what he has to say.
> Mr. Grochal: What if he didn't; makes it tough?
> Ms. Longson: It makes it tougher, yes. I would Like to hear both views.

At that point, the court interjected and instructed Ms. Longson that petitioner had an absolute right to remain silent and did not have to testify. At that point, the following exchange took place

> The Court: If he chooses not to testify, you will receive a jury instruction that says he doesn't and that you would not draw any negative or bad inference towards him as a result of that. Would you be able to follow this instruction if that fact scenario happens? He may testify and he may not. That's his decision.
> Ms. Longson: That's fine, yes.

The Court: You would be able to follow that?
Ms. Longson: Yes.
The Court: I wanted to clarify it since it was not an area of law that I got into when I gave the preliminary instruction but it's come up.
Mr. Grochal : Would it bother you to have to follow the instruction?
Ms. Longson: No problem. He has the right to to remain silent.

At that point, Mr. Grochal questioned Mr. Longson about her opinion about police officers. In responding to a question concerning how much importance she would attach to a police officer's testimony, Ms. Longson said "I would like to hear what the man— the girl and the young man have to say. I don't know what the police man will say to really make it concrete. I mean, they were not there." At that point Mr. Grochal began to question Ms. Longson again about her statements that she would like to hear what the "young man had to say". The prosecutor objected to any further inquiry on this subject because the questions had already been answered. The court sustained the objection.

The court's trial notes indicate that Mr. Grochal's questioning of Ms. Longson lasted 28 minutes. During that time, Mr. Grochal questioned Ms. Longson fully about Petitioner's right to remain silent and Ms. Longson's ability to follow the court's instructions. Ms. Longson indicated that she understood that Petitioner had a right to remain silent and that she could follow the court's instruction not to draw any negative inferences if he decided not to testify. Furthermore, Petitioner has not demonstrated that any prejudice resulted from Ms. Longson's desire to "hear what the young man has to say." Petitioner did testify at the trial and there is no indication that he considered not testifying. His trial strategy was to attempt to prove that the victim had consented to have

sex with him. It is difficult to imagine how he would prove that defense without testifying. Petitioner has not demonstrated that he is entitled to post conviction relief based on insufficient questioning of juror Longson.

C. Ineffective Assistance of Trial Counsel

Petitioner claims that he was denied effective assistance of trial counsel because his attorney did not exercise a peremptory challenge or a challenge for cause to excuse several jurors. The United States Supreme Court has developed, and the Minnesota Supreme Court has adopted, a two-part test for determining whether to grant a new trial based on ineffective assistance of counsel. Gates v. State, 398 N.W. 2d 558, 561 (Minn.1987); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under that test, the burden is on Petitioner to affirmatively prove that 1) counsel's representation fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Gates, 398 N.W.2d at 561 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2068). A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068). There is a strong presumption that an attorney's performance falls within the wide range of "reasonable professional assistance." State v. Jones, 392 N.W. 2d 224, 236 (Minn. 1986).

Petitioner claims that voir dire revealed that several jurors were not qualified to sit on the jury because they had been victims of crime or knew someone who had been a victim of a crime. As evidence of this, Petitioner points to portions of the transcript in which juror Lowery indicated that she was robbed at gunpoint one week before the trial; juror Jaggers' mother's house had been broken into and she herself had money taken from her purse; juror Longson's close niece had been abducted and "something bad happened;" juror Welch's

daughter had been molested; juror Van's sister had been raped; and Wilcox had worked with a female student who had been the victim of a sexual assault and had worked with the prosecutor's brother. In addition, Petitioner asserts that his counsel should have struck juror Salek from the jury because she said she had been shocked over the bizarre nature of the story when she read about it in the newspapers and indicated that she had strong feelings about date rape.

Petitioner relies on Johnson v. Armontrout, 961 F.2d 748 (8th Cir. 1992), in support of his argument that these jurors were biased and his trial counsel should have attempted to remove them from the jury. In Johnson, several jurors on the defendant's panel had already convicted a codefendant. It was clear that some of them had formed opinions about the defendant's guilt before the trial began. Id. at 754. The court determined that the defendant was prejudiced by the presence of those jurors and granted the defendant a new trial. Johnson, 961 F.2d at 756.

The record in the present case does not suggest that any of the jurors had formed an opinion prior to the beginning of the trial. The fact that some of the jurors had been victims of crime or knew others that had been victimized does not make them unfit to serve as jurors. Likewise, merely having "strong feelings" about date rape does not mean that a juror is biased. The court has an independent responsibility to remove biased jurors. It was the court's belief at the time of the trial and it remains the court's belief that none of the jury members were biased such that they were unfit to serve on the jury.

Selecting a jury requires an attorney to make tactical decisions. For example, despite their experiences with crime, Petitioner's counsel may have believed that these jurors would be receptive to Petitioner's defense theory. In addition, given the limited number of jurors that can be dismissed during voir dire and the fact that peremptory challenges were being

exercised after each juror was examined, Petitioner's counsel may have decided to save his peremptory challenges for more potentially prejudicial jurors that might be called later. It was clearly part of trial counsel's strategy to use strikes as he did. Petitioner's request for an evidentiary hearing to reexamine seven jurors will not be granted. Petitioner has cited no case law and the court is not aware of any case law that allows the reopening of voir dire through a post conviction relief petition.

After observing counsel in this case throughout the trial, it is this Court's belief that he performed his job in an effective, skilled, competent, and professional manner. His performance and skill in the courtroom were well above the average that the court sees. With the benefit of hindsight and knowing the verdict, it is possible to find grounds to criticize the attorney defending the case. However, the courts do not judge ineffective assistance of counsel claims based on the outcome.

Petitioner apparently seeks to call the victim, Holly Shadden, to establish that she "was not the victim of any sexual assault." The jury and appellate courts have already decided that issue. Petitioner has offered no argument as to how cross-examining Holly Shadden again with a different lawyer would establish ineffective assistance of trial counsel. This Court fails to see what would be gained from such a hearing other than harassing the victim years after the trauma occurred. The request for a hearing to recall the victim will be denied. Petitioner has failed to demonstrate that he received ineffective assistance of counsel.

D. Ineffective Assistance of Appellate Counsel

Petitioner argues that he was denied effective assistance of counsel because his appellate counsel failed to raise the Batson issue and an ineffective assistance of trial counsel claim. The analysis outlined above for ineffective assistance of trial counsel claims also applies to claims of ineffective

assistance of appellate counsel. When an appellant and his or her counsel disagree as to what issues should be raised on appeal, counsel is not obligated to raise claims which would detract from other more meritorious claims. Case v. State, 364 N.W.2d 797, 800 (Minn. 1985). "The right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal that the trial record supports." Garasha v. State, 393 N.W.2d 20, 22 (Minn.App. 1986) (citing Gray v. Greer, 778 F.2d 350, 353 (7th Cir. 1985). The Constitution requires only that appellate counsel's choice of issues to raise on appeal does not fall below an objective standard of reasonableness. Id.

Petitioner claims that his appellate counsel's failure to argue all conceivable claims demonstrates that the attorney's performance fell below an objective standard of reasonableness. However, as discussed above, the case law indicates that an attorney is not required to raise every possible claim on appeal. See Case, 364 N.W.2d at 800. An appellate attorney may decide not to include lesser claims that would detract from more meritorious claims. Such a decision does not indicate ineffective assistance of counsel. Petitioner admits in his Memorandum that the appellate counsel considered the Batson claim but decided that it was not meritorious. Such a strategic decision is not ineffective assistance of counsel. Petitioner has failed to support his claim that his appellate counsel's representation at the time of his direct appeal was unreasonable.

III. Conclusion

The Petition, file and record conclusively show that Petitioner is not entitled to relief. Therefore, there is no need for a hearing in this matter and Petitioner's Petition for Post-Conviction Relief is summarily dismissed pursuant to Minn. Stat. § 590.04(3).

P.D.B.
Initialed 10/31/96

United States Court of Appeals
For the Eighth Circuit

No. 96-3297

Christopher A. Tsipouras, Plaintiff/Appellant, v. Meshbesher, Birrell & Dunlap, Ltd.; Andrew S. Birrell, Esq.; John J. Luenig, Esq.; Steven J. Meshbesher, Esq.; John Doe, Defendants/Appellees.	* * * * * * * * * * * *	Appeal from the United States District Court for the District of Minnesota. (UNPUBLISHED)

Submitted: March 11, 1997
Filed: March 19, 1997

Before MAGILL, JOHN R. GIBSON, and MURPHY, Circuit Judges.

PER CURIAM.

In 1989, Christopher A. Tsipouras was convicted in state court of criminal sexual conduct in the first and third degrees and sentenced to 120 months imprisonment. After the unsuccessful appeal of his convictions, he brought this malpractice action for monetary damages from the attorneys who handled the criminal appeal. He contends that his attorneys committed malpractice on the appeal by not raising claims under Batson v. Kentucky, 476 U.S. 79 (1986), for jury bias, and for ineffective assistance of trial counsel. The federal district court dismissed the malpractice action, and Tsipouras appeals. After a thorough review of the record and consideration of the arguments on appeal, we conclude that the district court did not err by dismissing this case. The dismissal is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3297MNMI

Christopher A. Tsipouras,
Appellant,
vs.
Meshbesher, etc. et al.,
Appellees.

Appeal from the United States
District Court for the
District of Minnesota

The petition for rehearing filed by the appellant has been considered by the court and is denied.

April 23, 1997

Order Entered at the Direction of the Court:

Michael E. Gans (signed)
Clerk, U.S. Court of Appeals, Eight Circuit

Not Reported in N.W.2d
(Cite as: 1994 WL 200599 (Minn.App.))

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Daniel Leroy PATTEN, Appellant,
v.
Max J. RUTTGER, III, et al., Respondents.

No. C9-94-203.

Court of Appeals of Minnesota.

May 24, 1994.

Rehearing Denied June 29, 1994.

Appeal from District Court, Crow Wing County; James E. Preece, Judge.

Daniel Leroy Patten, pro se.

Criston L. Drake, Brainerd, for respondents.

Considered and decided by SCHUMACHER, P.J., and SHORT and HOLTAN, [FN*] JJ.

FN* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHUMACHER, Judge.

*1 Daniel Leroy Patten appeals from the district court's grant of a motion to dismiss his legal malpractice claim against respondents Max J. Ruttger III and his firm, Ryan, Ryan, Ruttger & Drake (firm). We affirm.

FACTS

In June 1991, Patten was convicted of kidnapping, assault, criminal sexual conduct, burglary, and attempted first-degree murder. Ruttger, appointed as an assistant public defender for the Ninth Judicial District in 1982, was Patten's attorney in the criminal case. Following his conviction, Patten filed a pro se appeal alleging that Ruttger failed to provide effective assistance during the criminal trial. In an unpublished opinion, we concluded that there was nothing in the record to suggest that Ruttger's performance was deficient. State v. Patten, No. C5-91-1706 (Minn.App. Aug. 4, 1992), pet. for rev. denied (Minn. Sept. 15, 1992).

Patten subsequently brought this legal malpractice action against Ruttger and his firm. The district court granted a motion to dismiss by Ruttger and his firm on the basis that Ruttger was immune from a malpractice claim for work performed as a public defender. Patten appeals.

DECISION

In reviewing a case dismissed for failure to state a claim, we need only determine whether a legally sufficient claim is set forth in the complaint. Elzie v. Commissioner of Pub. Safety, 298 N.W.2d 29, 32 (Minn.1980). Whether public defender immunity exists is a question of law, and no deference need be paid to the district court's resolution of the issue. See Snyder v. City of Minneapolis, 441 N.W.2d 781, 786 (Minn.1989) (existence of discretionary immunity is question of law).

1. Patten contends that the district court did not have jurisdiction to enter judgment against him because he was not served with a motion for summary judgment and because the motion to dismiss was untimely. We disagree.

Patten's complaint alleged that Ruttger was appointed to defend him in the underlying criminal action, thus implicitly acknowledging that Ruttger was his public defender. Furthermore, Ruttger's answer asserts that he served as Patten's public defender, and his motion to dismiss was based on the immunity from malpractice suits to which public defenders are entitled. The district court properly treated this as a motion to dismiss, and did not, as Patten argues, improperly fail to convert the motion into one for summary judgment. See Minn.R.Civ.P. 12.02 (motion asserting defense of failure to state a claim only becomes summary judgment motion if matters outside pleading are considered).

In addition, the motion to dismiss was not untimely. The defense of failure to state a claim upon which relief can be granted is not waived by a failure to plead it prior to answering the complaint and can be raised at any time, up to and including the time of trial. Minn.R.Civ.P. 12.08(b).

2. If Ruttger was a public defender when he represented Patten, he is immune from Patten's legal malpractice suit. Dziubak v. Mott, 503 N.W.2d 771, 773 (Minn.1993). This applies regardless of whether he was "state-appointed" or "state-subsidized." Id. at 777 (quoting Brown v. Joseph, 463 F.2d 1046, 1048 (3d Cir.1972), cert. denied, 412 U.S. 950 (1973)).

*2 Patten contends that issues of fact preclude a conclusion that Ruttger was a public defender. Specifically, he alleges that Ruttger accepted a secret retainer from him for serving as trial counsel in the underlying criminal case.

Even if we disregard the implicit acknowledgement in Patten's complaint that Ruttger was his public defender, there is no question of fact. The only support for the allegation that Ruttger accepted a retainer is affidavits from Patten and one of his acquaintances. Neither affidavit is notarized. As a result, they are invalid and do not prevent the entry of judgment for Ruttger and the firm. See Norton v. Hauge, 47 Minn. 405, 406, 50 N.W. 368, 369 (1891) (signature and official designation of officer with authority to administer oath or affirmation are essential to validity of affidavit); Minn.R.Civ.P. 56.05 (facts set forth in affidavits must be such that they would be admissible in evidence); Minn.R.Evid. 603 (witness required to take oath or affirmation before testifying).

Finally, we note that any conceivable error is rendered harmless because Patten has not presented any evidence to support a malpractice claim. See Minn.R.Civ.P. 61 (harmless error not grounds for reversal on appeal). To prevail in a malpractice action, a plaintiff must show, among other things, that the attorney's negligence was the proximate cause of the plaintiff's injury, and that but for the attorney's conduct, the plaintiff would have successfully defended in the underlying action. Blue Water Corp. v. O'Toole, 336 N.W.2d 279, 281 (Minn.1983). Patten claims that Ruttger's request for a continuance during the underlying criminal trial upset a "settlement" in which the state had agreed to dismiss the criminal charges. There is simply nothing in the record to support the contention that the state had agreed to do so. Nor is there any support for Patten's claim that Ruttger's performance during the criminal trial constituted malpractice. We indirectly rejected this argument when we previously addressed Patten's claim of ineffective assistance of counsel. We directly reject it now. There is no evidence that Ruttger performed in anything less than a fully competent and professional manner during

Patten's trial.

3. Patten argues that the district court erred by awarding costs and disbursements. An award of costs is reviewed under an abuse of discretion standard. Radloff v. First Am. Nat'l Bank, 470 N.W.2d 154, 156 (Minn.App.1991), pet. for rev. denied (Minn. July 24, 1991). Costs may be awarded against a party who has asserted a frivolous claim. Minn.Stat. § 549.21 (1992). An award of costs is not necessarily precluded by a party's pro se status. Liedtke v. Fillenworth, 372 N.W.2d 50, 52 (Minn.App.1985), pet. for rev. denied (Minn. Sept. 13, 1985). As we have noted, there is no evidence to support either Patten's allegation that Ruttger was not acting as a public defender or Patten's underlying claim of malpractice. The district court did not abuse its discretion by awarding costs and disbursements to Ruttger and his firm.

*3 Affirmed.

END OF DOCUMENT

Patten v. Ruttger, Minn. review denied, June 29, 1994 (No. C9-94-203).

STEVE,

HERE ARE the things that I FOUND AND thought to be IRREGULAR IN the PARTS OF the TRANSCRIPTS OF MY TRIAL that I'VE WENT OVER SO FAR

FROM VOIR DIRE

JURORS

I - P. 51 L. 15 - 18 MS. HERZOG-COWRY
I - P. 58 L. 7 - 13 MR. WELCH
I - P. 60 L. 15 MRS. JAGGERS
I - P. 67 L. 19 MS. LONGSON
I - P. 76 L. 8-9 MS. SALEK
I - P. 76 L. 20-25 " "
I - P. 76 L. 1 - 5-6-10 " " ALSO L. 12 } JURY FOREMAN

I - P. 128 L. 23 - I - P. 129 1 - 7 MS. LONGSON
I - P. 161 L. 14 - 22
I - P. 247 L. 7-14 / I P. 248 L. 3
I - P 277 - 288 - L. 21 - 1 - 8 RECORD BATSON V. KENTUCKY
I - P. 284 - 10 - 22 MS. SALEK
I - P. 308 - 13 - 20 MR WILCOX

JUL 31 1990

§ 1331. Federal question

TEXT
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

FEDERAL RULE 12(b)(6)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a

claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

MINN.STAT. 590.01

590.01. Availability, conditions

Subdivision 1. Petition. Except at a time when direct appellate relief is available, a person convicted of a crime, who claims that the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state, may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment

and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate. Nothing contained herein shall prevent the supreme court or the court of appeals, upon application by a party, from granting a stay of a case on appeal for the purpose of allowing an appellant to apply to the district court for an evidentiary hearing under the provisions of this chapter. The proceeding shall conform with sections 590.01 to 590.06.

Subd. 2. This remedy takes the place of any other common law, statutory or other remedies which may have been available for challenging the validity of a conviction, sentence, or other disposition and must be used exclusively in place of them unless it is inadequate or ineffective to test the legality of the conviction, sentence or other disposition.

Subd. 3. A person who has been convicted and sentenced for a crime committed before May 1, 1980 may institute a proceeding applying for relief under this chapter upon the ground that a significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively, including resentencing under subsequently enacted law.

No petition seeking resentencing shall be granted unless the court makes specific findings of fact that release of the petitioner prior to the time the petitioner would be released under the sentence currently being served does not present a danger to the public and is not incompatible with the welfare of society.

FEDERAL HABEAS CORPUS STATUTE

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.